2005

Richard G. Fordham v. Ryan Oldroyd : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

RICHARD G. FORDHAM,

Plaintiff-Appellant,

-v-

RYAN OLDROYD,

Defendant-Appellee.

REPLY BRIEF OF
PLAINTIFF-APPELLANT,
RICHARD G. FORDHAM

Case No. 20050325CA

APPEAL FROM FINAL ORDER (SUMMARY JUDGMENT)
OF THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
(HONORABLE L.A. DEVER)

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ORAL ARGUMENT AND PUBLISHED DECISION REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Mr. Fordham stands by his legal analysis, and its application to the instant dispute, that is set forth in his Opening Brief. He seeks to refrain from unnecessarily repeating the arguments, regarding the correctness of which he remains confident, that appear in that Brief.

I. MR. OLDROYD HAS ACKNOWLEDGED THAT THE "FIREMAN'S RULE" IS THE ONLY BASIS ON WHICH THE DISTRICT COURT COULD CONCEIVABLY HAVE GRANTED HIS MOTION FOR SUMMARY JUDGMENT AND HAS FAILED TO COUNTER IMPORTANT ASPECTS OF MR. FORDHAM'S ARGUMENT.

Mr. Oldroyd has in his Brief acknowledged that the only conceivable basis for the District Court's granting him summary judgment and refusing to allow this case to go to trial is application of the "Fireman's Rule."

Mr. Oldroyd has also failed satisfactorily to counter important aspects of the argument set forth in Mr. Fordham's Opening Brief, including the following: the proposition that application of the Fireman's Rule runs afoul of the Utah statutory scheme; the proposition that application of the Fireman's Rule runs afoul of the fundamental principle of Utah tort law that each person whose negligence proximately contributes to an injury should bear his proportionate share of fault for his conduct and pay his proportionate share of damages caused by his conduct; the proposition that application of the Fireman's Rule unfairly discriminates against Utah public safety officers; the proposition that

the original basis of the Fireman's Rule is not applicable to the facts of this case; and (implicitly), by acknowledging (at p. 11 of his Brief) that the Fireman's Rule does not work to bar Mr. Fordham's claim against the driver whose vehicle struck him,[1] the proposition that the Fireman's Rule is logically and legally inconsistent.

The Court may fairly infer that Mr. Oldroyd's failure satisfactorily to respond to these contentions is not as a result of lack of thoroughness on his counsel's part but based on the fact that no good arguments can be made against them.

II. MR. OLDROYD INCORRECTLY SUGGESTS THAT THE FIREMAN'S RULE APPLIES ONLY TO CLAIMS OF PEACE OFFICERS WHO RESPOND TO REQUESTS FOR ASSISTANCE BY PEOPLE SUCH AS MR. OLDROYD.

Near the conclusion of his Brief, at 12, Mr. Oldroyd contends:

> The [Fireman's] Rule recognizes that citizens should be free to summon help from professional rescuers without concern that they might later be sued by the public safety officer if he or she happens to be injured while confronting a hazard in the course and scope of his or her employment. To hold otherwise could constitute a [deterrent] to citizens summoning help when in need and would essentially create a double recovery for

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[1] As explained in Mr. Fordham's Opening Brief at 18-20, the supposed philosophical underpinnings of the Fireman's Rule -- including the notion that public safety officers are paid to encounter risks in the course of their employment -- should, if consistently applied, prevent public safety officers from pursuing claims against anyone whose negligence causes them to be injured -- not only those whose antecedent negligence causes them to be at a given scene, but also those whose negligence injures them while they are at the scene.

public safety officers injured in the course of their employment while receiving compensation for doing their jobs.[2]

The fact of the matter is that the Fireman's Rule, in its broadest application urged by Mr. Oldroyd, would work to prevent Mr. Fordham from recovering against Mr. Oldroyd regardless of whether Mr. Oldroyd himself made a "911" call or otherwise summoned aid. According to Mr. Oldroyd's overall position, the Fireman's Rule would prevent Mr. Fordham from recovering damages from Mr. Oldroyd regardless of whether someone else reported Mr. Oldroyd's own rollover incident and regardless of whether Mr. Fordham had just happened upon the scene.[3]

It is also worthy of note that the Fireman's Rule would not prohibit claims of, for example (this is but one example of the discriminatory nature of the Rule), ambulance personnel and paramedics responding to accident scenes caused by the negligence of people such as Mr. Oldroyd if such emergency

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[2] For reasons explained in Mr. Fordham's Opening Brief, at 12-13, the reference to "double recovery" in the final sentence of this excerpt from Mr. Oldroyd's Brief should be given no significant consideration. For a basic rule of Utah law (see Utah Code Ann. §34A-2-106) is that people injured while doing their jobs have the statutory right, even though they receive workers compensation benefits, to pursue claims against those whose negligence has caused them to sustain damages.

[3] Indeed, in this case, it was someone else (an occupant of a vehicle that was already at the scene), and not Mr. Oldroyd, who made the "911" call. R. 62-63.

responders should happen to be struck by vehicles such as the vehicle driven by the person who struck Mr. Fordham.

III. THIS COURT SHOULD NOT BE PERSUADED BY THE MERE FACT THAT THE MAJORITY OF JURISDICTIONS HEW TO THE FIREMAN'S RULE, GENERALLY OR AS APPLIED TO THE FACTS OF THIS CASE.

Mr. Oldroyd relies heavily on the proposition that the majority of jurisdictions still, apparently, cling to the Fireman's Rule. This Court is, of course, not bound by the case law of other jurisdictions. This Court should look at relevant policy considerations, the discriminatory nature of the Rule, its lack of consistent application, and the fact that basic principles of established Utah tort common and statutory law are not necessarily parts of the law of the states that have adopted and still apply the Rule. Applying the Fireman's Rule to Mr. Fordham's claim simply on the basis of a "head count" of decisions from around the country is not intellectually or legally satisfying.

IV. OTHER JUDICIAL PRONOUNCEMENTS IN ADDITION TO THOSE CITED AND DISCUSSED IN MR. FORDHAM'S OPENING BRIEF, AS WELL AS COGENT ANALYSES BY VARIOUS COMMENTATORS, SUPPORT THE PROPOSITION THAT THE FIREMAN'S RULE, GENERALLY OR AS APPLIED TO THE FACTS OF THIS CASE, SHOULD NOT WORK TO PREVENT MR. FORDHAM FROM PRESENTING HIS CASE AGAINST Mr. OLDROYD TO A JURY.

In Wills v. Bath Excavating & Constr. Co., 829 P.2d 405, 409 (Colo. App. 1991), the Colorado Court of Appeals explained:

> We agree with the Banyai [799 P.2d 441 (Colo. App. 1990), a case discussed in Mr. Fordham's Opening Brief at 15-16] analysis that, while a public safety officer's special skills, training, and experience may be considered with reference to any comparative negligence involved, a per se grant of immunity to those whose negligence created a dangerous situation for the officer is unwarranted. In consequence, we conclude that the fireman's rule is no longer the law in Colorado.
>
> The doctrine of assumption of risk is the law in Colorado and poses a question for the trier of fact. And, while not a complete bar to recovery, the assumption of risk is to be considered by the trier of fact in apportioning negligence. [Citation omitted.] Further because assumption of risk is a question for the trier of fact, it may not be decided on summary judgment. [Citation omitted.]
>
> Finally, we are not unmindful of the worthwhile public policy considerations which have given rise to the fireman's rule. We are also aware of the widespread, albeit often restricted, adoption of the principle in other jurisdictions. However we leave to the General Assembly any assignment of legal acceptance of the negligence of others to firemen, policemen, or any other public safety officers.
>
> The judgment [in favor of entities similarly situated to Mr. Oldroyd] is reversed, and the cause is remanded for trial.
>
> In Court v. Grzelinski, 379 N.E.2d 281, 285 (Ill. 1978), the Illinois

Supreme Court held:

> ... to the extent a fireman is a person to whom injury from [a] product may reasonably be foreseen, he may recover in products liability, even though his injury was incurred while fighting a fire in the course of his employment. In so holding, we reject the opportunity to extend the "fireman's rule" beyond its limited context of landowner/occupier liability.
>
> Also, in an insightful dissent, in Walters v. Sloan, 571 P.2d 609, 20

Cal.3d 199, 212-13 (Cal. 1977), Acting Chief Justice Tobriner wrote:

> Proponents of the fireman's rule argue most frequently that it is the fireman's job to extinguish fires and the policeman's job to make arrests. They conclude that a fireman or policeman can base no tort claim upon damage caused by the very risk that he is paid to encounter and with which he is trained to cope. The argument, in essence, is that the fireman or policeman, in accepting the salary and fringe benefits offered for his job, assumes all normal risks inherent in his employment as a matter of law, and thus may not recover from one who negligently creates such a risk. [Citations omitted.]
>
> The fallacy in this argument is simply that it proves too much. Under this analysis an employee would routinely be barred from bringing a tort action whenever an injury he suffers at the hands of a negligent tortfeasor could be characterized as a normal inherent risk of his employment. Yet, as noted above, past California cases have regularly permitted highway workers -- whose jobs obviously subject them to the "inherent risk" of being injured by a negligent driver -- to recover for damages inflicted by such third party negligence [citation omitted] and have permitted construction workers -- whose employment poses numerous risks of injury at the hands of another -- to recover tort damages for work-related injuries so long as the negligent tortfeasor is not their employer. [Citation omitted.]
>
> As these and countless other cases demonstrate, while policemen and firemen regularly face substantial hazards in the course of their employment and are, theoretically at least, compensated for such risks, a host of other employees -- highway repairmen, highrise construction workers, utility repairmen and the like -- frequently encounter comparable risks in performing their jobs and, again theoretically, also receive compensation for such risks. California decisions have never perceived such theoretical compensation as a sufficient basis for barring the employee's cause of action against a negligent tortfeasor.

The author of Case Note: Waggoner v. Troutman Oil Company -- Arkansas Adopts the Fireman's Rule: Do Volunteer Firefighters Get Burned Twice?, 50 Ark. L. Rev. 363, 374-75 (1997), wrote:

By denying a public safety officer recovery from a negligent tortfeasor the officer is not directed to recover his damages from the general public; rather the officer is totally precluded from recovering these damages from anyone. Contrast this with other public employees who are injured when confronting dangers on their jobs. The latter can recover workers' compensation and salary benefits from the public, but are also allowed additional tort damages from the third-party tortfeasors. Under the "fireman's rule" the injured public safety officer must bear a loss which other public employees are not required to bear.

The author of Note: Equal Protection and the Fireman's Rule in Ohio, 38 Case W. Res. L. Rev. 123, 144 (1988), wrote:

> The common law governing the suits of firemen and policemen against tortfeasors for personal injury damages is in need of a complete restructuring. The most traditional fireman's rule bars firemen from recovery for injuries directly resulting from a fire and categorize them as licensees in their suits against landowners for injury resulting from the negligent maintenance of their property. The Ohio courts have not modernized, or indeed even altered to any extent, this rule since its creation, and the landowner's duty system upon which it is based is outdated.
>
> The determination of whether firemen and policemen can recover for their injuries should depend instead, upon the presence of fault, the basis of all tort law. In short, the property owner should be liable to the [fireman] for his injuries directly resulting from the fire when the landowner negligently or intentionally caused the fire. The fireman should be owed that same duty of care owed to rescuers and public and private employees -- a general duty of care owed to all foreseeably injured.
>
> This restructuring would remedy the inequitable treatment suffered by firemen and policemen, and at the same time, would further two important public policies. Allowing recovery by firemen would serve to deter negligence in causing fires and would encourage persons to enter this important area of public service which asks man every day to put another's safety and welfare before his own.

The author of Note: Has the Michigan Firefighter's Rule Gone up in Smoke? An Analysis of the Wilful and Wanton Exception, 44 Wayne L. Rev. 1555, 1572-77 (Fall 1998), wrote:

> It is unjust to assign firefighters and police officers, officials who risk their lives to protect the public, to a status less than that of every other citizen. In essence, the courts are creating individualized duties of care based on occupational status, a practice that no Michigan court expressly condones.
>
> Further defects in the policy argument are seen in the inadequacy and harmful effects that can result from forcing police officers and firefighters to rely solely on workers' compensation. The courts have immunized tortfeasors from liability arising from their negligent misconduct by limiting safety officials to statutory recovery. This in turn fosters negligent behavior. People have no incentive to take proper precautions for fire prevention and criminals are afforded a greater degree of recklessness. While negligent citizens are being provided immunity, injured officers are being deprived adequate recovery as workers' compensation is generally inferior to a tort recovery.
>
> The notion that workers' compensation will best spread the cost of officers' injuries to the public as a whole is also a fallacy. Since taxpayers provide funds for the worker's compensation benefits that pay injured officers, the system requires citizens who act non-negligently to pay for the misconduct of other citizens. The firefighter's rule forces the individual safety officer and the non-negligent citizen to unfairly shoulder this burden. Allowing safety officials to pursue third-party tort claims would alleviate this burden and would allow worker's compensation insurers the right of subrogation to any proceeds from a third-party award, reducing overall taxpayer expenses.
>
> ...
>
> The analysis is simple. Courts will merely apply general principles of negligence in determining whether recovery should be permitted to a particular public safety officer. Fundamental concepts of duty, breach, causation, and damages will determine liability instead of the current

> complicated and ambiguous exceptions. The trier of fact will consider whether "a defendant breached a legal duty owed to the plaintiff," and whether that breach was the actual and proximate cause of the plaintiff's injuries. Where a plaintiff fails to act reasonably under the circumstances, the general principles of comparative negligence will diminish the recovery. This system, grounded in familiar legal theories in which attorneys and courts are well-versed, will grant the greatest assurances of safety, cost prevention, efficiency and justice. Such a system will give firefighters and police officers a chance to recover the rights and privileges that a poorly conceived and poorly executed rule of law has stolen.

V. CONCLUSION

As has been articulated in Mr. Fordham's Opening Brief and in the foregoing analysis and examples of case law and commentary treatment of the issue, this Court should rule that no part of the Fireman's Rule is or should be part of the common law of the State of Utah. There are compelling reasons to so rule and no truly satisfactory reason to rule otherwise.

Alternatively, and if this Court is somehow persuaded that the original purpose of the Fireman's Rule -- to insulate from liability landowners whose negligence causes firefighters to arrive at scenes of fires -- for whatever reason makes sense, this Court should follow the cases, discussed in Mr. Fordham's Opening Brief and in this Brief, that limit application of the Fireman's Rule to such circumstances only (circumstances that are not present in this case).

This Court should, in any event, rule that the Fireman's Rule does not preclude Mr. Fordham from pursuing his claims against Mr. Oldroyd and should, accordingly, reverse the District Court's grant of summary judgment and instruct the District Court to allow this case to proceed to trial.

Respectfully submitted this 21st day of September, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 21st day of September, 2005, I caused to be served two true and correct copies of the foregoing REPLY BRIEF OF PLAINTIFF-APPELLANT, RICHARD G. FORDHAM by the method indicated below, and addressed to the following:

David W. Lund
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